TOWER TECH INC

v.

DE LINK MACHINERY AND ENGINEERING SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU
SULONG MATJERAIE JC
[COMPANIES' WINDING-UP NO: 28-224 OF 1998]
21 MAY 1999

COMPANY LAW: *Winding-up - Petition - Alleged debt disputed - Whether dispute based on substantial grounds - Whether debts must be undisputed before company can be wound up - Whether dispute ought to be settled in other proceedings before petition is brought - Whether petition may be postponed until dispute settled in other proceedings*

This was a winding-up petition based on an alleged debt owed to the petitioner by the respondent. The petition was opposed on the ground that the sum claimed as the debt owed was actually a sum representing freight charges which the petitioner had agreed to bear. In support of this contention, the respondent exhibited an invoice which included the term "freight prepaid and allowed". The petitioner responded by alleging that the petitioner had unilaterally imposed this term. There also was in evidence a purchase order between the parties wherein it was stated that the petitioner agreed to reimburse the respondent for claims by third parties for ocean freight. In fact, this was confirmed by the petitioner in its affidavit. The main issue before the court was whether the dispute as to the debt was on substantial grounds or not.

Held:

[1] If the purchase order was not acceptable to the petitioner, they have every right not to proceed to send the goods. However, they did send the goods but they chose to say that the term on freight charges was unilaterally imposed by the respondent.

[2] Even if it was established that there is a debt, the petitioner needs to displace the contention that the debt is no longer in existence in view of the affidavit which acknowledges that the petitioner would agree to reimburse the respondent and in view of the terms found in the purchase order.

[3] Based on the evidence, there is a *bona fide* dispute as to the existence of the debt and the dispute is on substantial and solid grounds. Only when debts are not disputed and all terms are met would a company be wound up for winding-up leads to displacement of workers and other

consequential problems. It would be wrong to stand over the petition in order that the disputed issues might be resolved in other proceedings. It is best that this dispute be brought before another court to determine the issue of debt payable first. If debts are no longer in dispute then the petitioner may apply again later on.

[Petition dismissed.]

Case(s) referred to:
Jurupakat Sdn Bhd v. Kumpulan Good Earth 1973 Sdn Bhd [1988] 1 CLJ 649 ***(refd)***
Re Lympne Investment [1972] 2 All ER 385 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 218(2)(a)

For the petitioner - John Yong; M/s Gana Muthusamy & Co
For the respondent - TS Chang; M/s Henry Soong & Chang
For the assignee - Azizah Hassan

Reported by S Dharmendran

JUDGMENT

Sulong Matjeraie JC:

Facts

This is winding-up petition at encl. (2) against the respondent for an alleged debt of RM52,166.38 being the balance due for goods sold and delivered and with interest thereon as claimed in para. 5 of encl. (2).

There was a notice issued pursuant to s. 218(2)(a) of the Companies Act 1965.

The receipt of the said notice is not disputed.

The respondent opposed the petition and this is supported by an affidavit in opposition of the petition filed herein on 14 April 1999.

At the earlier part of the hearing today, the petitioner raised preliminary objection on the affidavit in opposition but after hearing arguments from both sides and with the kind agreement of Mr James Edward Young, the Manager of Asia Division of the petitioner, they agreed to proceed with the matter proper and withdrew their preliminary objection.

The grounds of the respondent company opposing the said petition could be found at paras. 3(a), 3(b), 3(c), 3(d) and 3(e) of encl. (5).

The respondent argued that the sum claimed (RM52,166) is actually a sum representing freight charges which the petitioner has agreed to bear.

This argument was denied by the petitioner and is supported by an affidavit deposed by Mr James Edward Young affirmed on 21 April 1999 and filed at encl. 11. It was alleged that the amount of RM52,166 represents the final balance of 10% of the purchase price as evidenced by the purchase order dated 6 May 1997 issued by the respondent to the petitioner.

However, the respondent said that the petitioner have agreed to bear the amount of RM52,166. This arrangement is reflected in exh. A2 of encl. 5 where Invoice No. 3000 dated 16 May 1997 includes a term "freight prepaid & allowed". Similarly the invoice, includes the particulars of Customer Order No. P/971000/DE.

Paragraphs 3(d) and 3(e) of affidavit in opposition of the petition – encl. (5) remained unanswered in the affidavit-in-reply encl. (11). Learned counsel for the petitioner said from the bar that this was an attempt by the respondent to "cloud" the issue. This court cannot put too much weight on such argument if it is not supported by pleadings. The reason is obvious.

However learned counsel admitted and confirmed that the petitioner will pay the respondent if the payment of the amount of USD18,500 complied with the terms of the letter dated 14 September 1997 issued more than four months after the purchase order which was dated 6 May 1997.

Paragraph 6 of the affidavit in reply encl. (11) alleged that the respondent unilaterally imposed that the sum of USD18,500 as Ocean freight charges will be claimable from Tower Tech. The petitioner also said that they agree to reimburse the respondent for any debit note for payment of future invoices for claims by a third party in the affidavit. In the actual letter, it said "... we agree to reimburse DE Link for any debit notes from payments or future invoices for claim by Antara Stell for ocean freight under PO P/97100/DE." Further it could also be argued that if the terms of the purchase order was not acceptable to the petitioner, they have every right not to proceed to send the goods. However, they did send the goods but they chose to say that the term on freight charges was unilaterally imposed by the respondent.

There appear to be some discrepancies here.

Be that as it may, what is obvious to this court is that the debts disputed by the respondent.

It was argued that there was in fact an agreement through exchange of documents that tend to show that the amount claimed is not a debt at all.

The question that needs to be posed is, whether the dispute is on substantial grounds or not?

It is the considered view of this court that looking through the affidavits and after hearing the learned counsel for the petitioner as well as for the respondent there is a substantial dispute as to the debt itself.

It would be wrong to stand over the petition in order that the disputed issues might be resolved in other proceedings.

Even if it were established that there is a debt, the petitioner needs to displace the contention that the debt is no longer in existence in view of the affidavit which acknowledges that the petitioner would agree to reimburse the respondent and to the terms found in the purchase order.

It seems to this court therefore that based on the evidence before it, there is a *bona fide* dispute as to the existence of the debt. The dispute is on substantial and solid ground.

This court is mindful of the need to ensure that only when debts are not disputed and all terms are met would a company be wound up for winding up leads to displacement of workers and other consequential problems. If debts are no longer in dispute then the petitioner may apply again later on.

This court, unfortunately cannot be used for debt collecting agency, to use the phase of Megarry J in *Re Lympne Investment* [1972] 2 All ER 385 (Re Lympne) at p. 389 nor as a means of bringing improper pressure to bear on the company. The decision of *Re Lympne* has been accepted by our court in *Jurupakat Sdn Bhd v. Kumpulan Good Earth 1973 Sdn Bhd* [1988] 1 CLJ 649; [1988] MLJ 49 where it was held by the Learned Zakaria Yatim J (as his Lordship was then) that where a petition is based on a debt which is disputed on substantial grounds, the petitioner is not a creditor. That being the case the petitioner is not entitled to present a petition or apply for a winding-up order.

It is best that this dispute be brought before another court to determine the issue of debt payable first.

For the obvious reason of substantial dispute as regards the debt, the petition is hereby dismissed and taking cognisance of the amount of work put in by the petitioner this court is making no order as to costs.

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